



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**Criminal Case 48 of 2004**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**ALEXANDER KUBEL.....1<sup>ST</sup> ACCUSED**

**GEOFFREY LANGAT.....2<sup>ND</sup> ACCUSED**

**JUDGMENT**

The accused persons, Alexander Kubel (*hereinafter referred to as the 1<sup>st</sup> accused*) and Geoffrey Langat (*hereinafter referred to as the 2<sup>nd</sup> accused*) were charged with Murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the offence were that on the 7<sup>th</sup> February 2004 at 7.30 p.m., at Saosa village, Olenguruone in Nakuru District, the accused persons jointly murdered Simon Kibii Arap Soi alias Cheplanget (*hereinafter referred to as the deceased*). When the accused persons were arraigned before this court, they pleaded not guilty to the charge. Before the trial commenced, the 1<sup>st</sup> accused Alexander Kubel died in remand custody. The case against him therefore abated. The case proceeded against the 2<sup>nd</sup> accused only. The prosecution called six witnesses in its bid to establish the charge against the 2<sup>nd</sup> accused. After the close of the prosecution's case, the 2<sup>nd</sup> accused was put on his defence. He gave a sworn statement in which he raised an alibi defence. He stated that he was not present at the scene when the deceased was assaulted.

The facts of this case as can be reconstructed from the evidence adduced by the prosecution witnesses are as follows; the family of the 2<sup>nd</sup> accused and that of the deceased lived on parcels of land adjoining each other. The two families were neighbours. From the evidence adduced by PW1 Leah Bii, the daughter in-law of the deceased and PW2 Geoffrey Langat, the grandson of the deceased, the two families had an existing boundary dispute. The relationship between the deceased and the 1<sup>st</sup> accused was not good. Matters were not helped by the fact that the dispute appears to have been exacerbated by the fact that there was bad blood between the deceased and the 1<sup>st</sup> accused.

On the 7<sup>th</sup> February 2004 at about 7.00 p.m., PW1 was at her home preparing supper. She testified that the deceased at the time was in the house. The 1<sup>st</sup> accused came to her house and inquired the whereabouts of his son called Geoffrey Langat (*the 2<sup>nd</sup> accused*). According to PW1, the deceased was unhappy that the 1<sup>st</sup> accused had gone to his house. The deceased inquired from the 1<sup>st</sup> accused why he had gone to his house without his permission. A quarrel ensued between the two, which later led to a fight. PW1 testified that, at the time, the deceased and the 1<sup>st</sup> accused appeared drunk. PW1 managed to

separate them. The 1<sup>st</sup> accused went away. PW1 heard the 1<sup>st</sup> accused threaten the deceased. The 1<sup>st</sup> accused claimed that the deceased had abused him by referring him as uncircumcised. PW1 recalled that after he had separated them, the deceased took supper and then went to his house which was about 15 metres away from her house.

Meanwhile, at the same moment while the deceased and the 1<sup>st</sup> accused were quarrelling, PW2 was in his house reading. He was at the time a standard 8 pupil. He testified that he had put on a lantern. He recalled that at about 8.00 p.m., the 2<sup>nd</sup> accused knocked at his door. PW2 opened the door for the 2<sup>nd</sup> accused but the 2<sup>nd</sup> accused declined to enter the house and went away. PW2 knew the 2<sup>nd</sup> accused. In fact at one time the two were friends. He recalled that after a short while he heard the deceased screaming. He rushed to the house of the deceased. He found the 2<sup>nd</sup> accused beating the deceased using a piece of stick which had a metal stud on one of its end. He testified that the 2<sup>nd</sup> accused hit the deceased on the head, mouth and chest. The 2<sup>nd</sup> accused was beating the deceased while inside the house of the deceased. PW2 recalled that he saw the 2<sup>nd</sup> accused beat the deceased by the light from the lantern in the house of the deceased. He decided to lock the 2<sup>nd</sup> accused inside the deceased's house as he sought help. He then ran to PW1's house and informed her of what had transpired. The two of them rushed back to the house of the deceased. They found the deceased unconscious. PW1 screamed and alerted the neighbours. PW3 Josiah Kipngetch Langat arrived at the scene.

PW1 and PW2 testified that they administered first aid on the deceased by washing blood that was on his face. The two witnesses testified that blood was oozing from the mouth of the deceased. PW2 recalled that the deceased was also bleeding from injuries on his head and his legs. After first aid was administered on the deceased, he regained consciousness. According to PW1, the deceased told her that he had been assaulted by the 1<sup>st</sup> accused. On his part, PW2 was categorical that the deceased said that he had been assaulted by the 2<sup>nd</sup> accused. When PW1 and PW2 entered the house of the deceased, they found the deceased lying on the floor. According to PW2, the 2<sup>nd</sup> accused had by that time escaped from the house. PW1 did not see anyone within the vicinity of the house of the deceased. She did not particularly see either the 1<sup>st</sup> accused or 2<sup>nd</sup> accused. PW2 testified that later that night, he heard the accused persons standing near the fence that separated their farms uttering war cries while still armed.

PW3 testified that he was at his home at about 7.30 p.m. on the material evening when he heard screams emanating from the house of the deceased. He went to investigate. He found the deceased lying unconscious in his house. His face was bloody. PW3 tried to administer first aid to the deceased. He recalled that at the time, PW2 told him that it was the 2<sup>nd</sup> accused who had assaulted the deceased. He however conceded that he did not witness the deceased being assaulted. He recalled seeing the accused persons chanting next to the compound of the deceased saying that they had seen blood. PW3 was aware of the existence of a grudge between the family of the accused and the family of the deceased. He testified that the two families had a dispute over a land boundary. They had also disagreed over animals. He recalled that when he learnt that the deceased had died, he informed the area chief and participated in the search and arrest of the 2<sup>nd</sup> accused. He reiterated that the members of their village had decided that the 1<sup>st</sup> accused had to answer for having assaulted the deceased.

PW4 Richard Soi, the brother of the deceased, identified the body of the deceased on the 16<sup>th</sup> February 2004 when post-mortem was performed at the Molo District Hospital Mortuary. The post-mortem was performed by PW6 Dr. Philip Wainaina Kamau. He testified that upon examining the deceased, he saw a cut wound of about 5 cm x 1 cm on the left upper limb. There was a cut on the right eye slit measuring 2 cm x 0.5 cm deep. There were bruises on the feet. On the right heel there was a cut 2 cm x 2 cm. There was a bruise on the big toe. There was a bruise on the anterior aspect of the left leg. There was a fracture of the left 2<sup>nd</sup> rib. There were tissues stained with blood on the sternum. There was pus on the lower abdomen with adhesion of colon. There were tissues staining on the anterior oricular region. There was fracture of the anterior oricular bone with blood oozing from the skull. PW6 formed the opinion that the cause of death of the deceased was cardiopulmonary arrest secondary to severe head and chest injury in a patient with peritonitis. The post-mortem report was produced as *prosecution's*

*exhibit No.1.* The 2<sup>nd</sup> accused was assessed and found to be mentally fit to stand trial. His medical report was produced as *prosecution exhibit No.2.*

Upon the death of the deceased, a report was made to Olenguruone Police Station. PW5 PC Edward Mugambi was assigned to investigate the case. He testified that upon concluding his investigations, he came to the decision to charge the accused persons with murder. He testified that his investigations had revealed that the accused persons had assaulted the deceased due to the existing land dispute. He recalled that the 1<sup>st</sup> accused was brought to the police station by members of the public a day after the death of the deceased. He testified that on the 12<sup>th</sup> February 2004, he arrested the 2<sup>nd</sup> accused from the house of his relatives. He recalled that when he attempted to arrest the 2<sup>nd</sup> accused, the 2<sup>nd</sup> accused attempted to escape. The 2<sup>nd</sup> accused was however chased, overpowered and arrested.

When the 2<sup>nd</sup> accused was put on his defence, he denied that he was at his home when the incident is alleged to have taken place. He gave an alibi defence. He stated that he was at the material time residing with the brother of his father called David Chirchir. He testified that he was surprised when on the 12<sup>th</sup> February 2004 the police went to his uncle's residence and arrested him on allegations that he had participated in the fatal assault of the deceased. He testified that he had no grudge against the prosecution witnesses who had implicated him in the said assault. He however could not tell why the said prosecution witnesses had chosen to implicate him in the commission of the offence.

In criminal cases, it is the duty of the prosecution to establish the guilt of an accused person to the required standard of proof beyond reasonable doubt. An accused person is under no obligation to prove his innocence. His duty is only restricted to raising reasonable doubt on the prosecution's case. The burden of proving a criminal case is always on the prosecution and does not shift to an accused person. This court is required to evaluate the evidence that was adduced by the prosecution witnesses and the defence offered by the accused so as to reach its own determination whether or not the prosecution established the guilt of the accused person.

In the present case, the prosecution offered both direct and circumstantial evidence. The direct evidence was that of PW1 and PW2. PW1 testified that on the material evening, the 1<sup>st</sup> accused went to her house and inquired of the whereabouts of the 2<sup>nd</sup> accused. The deceased saw the 1<sup>st</sup> accused. The deceased was not amused that the 1<sup>st</sup> accused had gone to the house of PW1 without seeking his permission. The prosecution established that the relationship between the 1<sup>st</sup> accused and the deceased was not good. This was due to an existing boundary dispute between them. According to PW1, the 1<sup>st</sup> accused and the deceased quarreled. The quarrel degenerated into a fight. PW1 managed to separate the deceased and the 1<sup>st</sup> accused. The 1<sup>st</sup> accused went away towards the direction of his house. PW1 heard the 1<sup>st</sup> accused threaten to harm the deceased. He claimed the deceased had abused him and called him uncircumcised. The deceased took supper in the house of PW1. Thereafter he went to his house.

It was while at his house, that the deceased was assaulted and fatally injured. According to PW2, the 2<sup>nd</sup> accused had, prior to assaulting the deceased, knocked at his house and refused to enter the house. Shortly thereafter, PW2 heard the deceased screaming. He rushed to his house and saw PW2 assaulting the deceased with stick with a metal stud at one end. PW2 testified that he saw the 2<sup>nd</sup> accused assault the deceased severally over his body. The testimony of PW1 and PW2 is however contradictory as to what the deceased said when he regained his consciousness. Whereas PW1 claimed that the deceased had told her that he had been assaulted by the 1<sup>st</sup> accused, PW2 testified that the deceased stated that he had been assaulted by the 2<sup>nd</sup> accused. This can however be explained by the confusion that occurred during the time after the assault of the deceased. The 2<sup>nd</sup> accused denied that he was within the vicinity of the homestead of the deceased during the time of the assault. He claimed that he was at his uncle's residence at the time.

The issue for determination is therefore whether the prosecution proved to the required standard of proof beyond reasonable doubt that it was the 2<sup>nd</sup> accused that participated in the assault of the deceased that

led him (*the deceased*) to sustain fatal injuries. The doctor who examined the body of the deceased after his death was of the opinion that the deceased died due to the injuries that he had sustained during the assault. In the present case, the prosecution also established that there existed a grudge between the family of the deceased and that of the accused. PW3 testified that he was aware of the existence of a boundary dispute between the family of the deceased and the family of the accused. The difference was made worse when the said families disagreed over animals which had grazed on the other family's parcel of land.

On the material evening, the deceased quarreled with the father of the 2<sup>nd</sup> accused. According to PW1, the deceased chased the father of the 2<sup>nd</sup> accused from her compound when the father of the 2<sup>nd</sup> accused came inquiring of the whereabouts of the accused. The father of the 2<sup>nd</sup> accused (*who died before the conclusion of this case*) was unhappy that the deceased abused and fought him when he went to his house. It was apparent that he informed the 2<sup>nd</sup> accused to confront the deceased. The accused went to the house of the deceased, armed with a rungu, and assaulted the deceased causing the deceased to sustain injuries which later proved to be fatal. I believed the testimony of PW1 and PW2 as relates the circumstances under which the deceased was assaulted. I particularly assessed the demeanour of PW2 when he testified before this court and formed the opinion that he was a truthful witness. His evidence was congruent and consistent. It was not shaken on cross-examination. He clearly explained the circumstances under which he saw the 2<sup>nd</sup> accused assault the deceased in his house. His evidence was that of an eye witness.

Taking into totality the evidence adduced by the prosecution witnesses, this court reached the conclusion that the prosecution established that it was the accused who assaulted the deceased and thereby caused him to sustain fatal injuries. The accused had the motive to cause harm to the deceased. The deceased had moments earlier to the incident fought with his father. There existed a boundary dispute between the two families. There was a grudge between the two families.

The 2<sup>nd</sup> accused attacked the deceased in an act of revenge. He had malice aforethought. I therefore hold that the prosecution proved to the required standard of proof beyond reasonable doubt that the 2<sup>nd</sup> accused killed the deceased with malice aforethought. I considered the defence of the 2<sup>nd</sup> accused. The said defence was self serving since it did not dent the otherwise strong evidence against the 2<sup>nd</sup> accused adduced by the prosecution. The assessors who assisted this court during the hearing of this case were of the opinion that the accused was guilty of murder. For the reasons stated above, I agree with them. The 2<sup>nd</sup> accused is consequently convicted of Murder in accordance with Section 203 as read with Section 204 of the Penal Code.

**DATED at NAKURU this 16<sup>th</sup> day of November 2007**

**L. KIMARU**

**JUDGE**